

1 UNITED STATES DISTRICT COURT  
 2 NORTHERN DISTRICT OF WEST VIRGINIA  
 3 AT CLARKSBURG  
 4 - - -

5 CHRISTY J. RHOADES, in her CIVIL ACTION NO. 1:18-CV-186  
 6 capacity as the Administratrix  
 7 and Personal Representative of  
 8 the estate of Philip Jontz  
 9 Rhoades,

10 Plaintiff,

11 V.

12 DAVID FORSYTH, in his official  
 13 and individual capacity,

14 Defendant.

15 - - -  
 16 Proceedings had in the Jury Trial, of the above-styled  
 17 action on Tuesday, April 6, 2021, before the Honorable Judge  
 18 Thomas S. Klee, District Judge, at Clarksburg, West Virginia.  
 19 - - -

20 APPEARANCES:

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1 (Voir dire was conducted on April 6, 2021, and a jury was  
2 impaneled and sworn. Transcript filed under seal.)

3 (The following transpired in open court outside the  
4 hearing of the jury at 12:58 p.m.)

12:58:11 5 THE COURT: Please be seated. I forgot to mention I  
12:58:17 6 think it's always a good idea to stand when the jury comes in  
12:58:20 7 and out, so I mention that, while everybody is all in full  
12:58:24 8 compliance. Why don't you all plan to be back here in the  
12:58:27 9 courtroom at 2:00, and we will take up anything we need to  
12:58:31 10 before openings. But if counsel would be back at 2:00, we  
12:58:38 11 will get our ducks in a row, and then we will get started with  
12:58:42 12 openings at 2:15 promptly. Anything we need to take up at  
12:58:42 13 this point in time?

12:58:42 14 Mr. Umina.

12:58:47 15 MR. UMINA: No, Your Honor.

12:58:47 16 THE COURT: Ms. Durst.

12:58:47 17 MS. DURST: No, Your Honor.

12:58:48 18 THE COURT: All right. We will see you guys at 2:00  
12:58:51 19 then. Thank you.

12:58:51 20 (Recess taken at this time 12:58 p.m. - 1:59 p.m.)

12:58:51 21 (The following transpired outside the hearing of the jury  
01:59:34 22 in open court.)

02:00:53 23 THE COURT: Thank you, everyone. Please be seated.  
02:01:00 24 And again, we are going to fix that for trial, but we are  
02:01:04 25 going to put you all back where you belong. We will have a

02:01:08 1 podium. It will be in its usual spot behind -- sort of behind  
02:01:13 2 counsel table, but I think we will have sufficient space to be  
02:01:17 3 able to be set up more normal, again, given that we will have  
02:01:21 4 all of our jurors in the box. I think that makes the most  
02:01:25 5 sense.

02:01:25 6 My logistical plan; we're going to discuss that one  
02:01:28 7 issue, then we will bring the jury back in. I will get  
02:01:32 8 through our preliminary instructions. This will come as a  
02:01:35 9 great surprise to all of you, they are lengthy. So we'll do  
02:01:39 10 that, and then we will probably take a break, give you guys a  
02:01:42 11 chance to get set up and ready for openings and roll from  
02:01:45 12 there, so we can call a witness and get started. I don't know  
02:01:50 13 who is first. We'll do openings and then we can go from  
02:01:57 14 there.

02:01:57 15 My plan, also given Mr. McCartney's vaccine appointment  
02:02:04 16 tomorrow, will be to start at 10:00 with trial. The building  
02:02:07 17 will be open, of course, you all can be here as early as you  
02:02:10 18 like, but I will ask the jury to be here at 10:00. And if he  
02:02:13 19 is running late, we will just wait for him and keep our  
02:02:15 20 fingers crossed he doesn't have any adverse reactions. If he  
02:02:19 21 does, we will deal with that when we need to. But that would  
02:02:24 22 be my plan, is to start at 10:00 tomorrow to accommodate  
02:02:29 23 Mr. McCartney's schedule at that point.

02:02:31 24 So my understanding, based on our brief discussion  
02:02:34 25 upstairs, basically is your motion, Mr. Umina, with respect to

reference and radio traffic to the belief that Mr. Rhoades was armed during the pursuit?

MR. UMINA: Yes, Your Honor. It's merely the transmission itself. Again, it's an individual saying, "Last I heard he was armed." So we have hearsay first off, because we have no idea where the source of that information came from. So we object on those grounds.

And then, again, all of the other case law and evidentiary rules, the calculus used at the moment force was used. And in this case, again, we know from the West Virginia State Police statement and deposition testimony, that was not part of his calculus, that relief. He never once relied on that relief, so for that reason --

THE COURT: Now, there was testimony in Defendant Forsyth's deposition that he reached toward the floorboard before the shooting; is that correct?

MR. UMINA: Yes, Your Honor. And we have an issue if he testifies to that.

THE COURT: Right.

MR. UMINA: But it is specifically the radio traffic because, again, we don't have any indication that was part of his calculus. Reaching the floorboard, that's a completely separate event, certainly can be testified to.

THE COURT: All right. Ms. Durst.

MS. DURST: Actually, Mr. Carroll, Your Honor.

02:03:50 1 THE COURT: Oh, Mr. Carroll, my apologies.

02:03:53 2 MR. CARROLL: That's quite all right.

02:03:54 3 THE COURT: I mean no offense if I just get in a  
02:03:57 4 pattern of yelling the wrong lawyer names. My apologies.

02:04:01 5 MR. CARROLL: That's quite all right, Your Honor. I  
02:04:03 6 wanted to address the hearsay argument. I don't think that  
02:04:06 7 this is excluded under hearsay because it's presented for the  
02:04:10 8 effect upon Defendant Forsyth. It's not presented for the  
02:04:11 9 purpose of showing that Mr. Rhoades was armed, simply that our  
02:04:17 10 deputy was responding to a call, and that is something that a  
02:04:19 11 reasonable officer would have taken into account.

02:04:21 12 I think based off of the Court's prior rulings, the prior  
02:04:25 13 history, the prior incident, those are things that have the  
02:04:28 14 risk of prejudice. I think the Court found that those may be  
02:04:32 15 relevant; however, prejudice is the reason that they would be  
02:04:34 16 excluded. Here we don't have that issue. The fact whether or  
02:04:38 17 not Deputy Forsyth believed that the -- Mr. Rhoades was armed,  
02:04:42 18 there is no prior criminal history. There is no -- we're not  
02:04:46 19 trying to prove to you -- we're simply trying to show what a  
02:04:50 20 reasonable officer would have perceived under the  
02:04:52 21 circumstances, and I think that's appropriate under the case  
02:04:54 22 law.

02:04:55 23 THE COURT: When in the timeline of events was this  
02:04:58 24 utterance made on the radio traffic?

02:05:00 25 MR. CARROLL: I believe it was approximately ten

02:05:02 1 minutes before the --

02:05:02 2 THE COURT: The shooting?

02:05:03 3 MR. CARROLL: -- the shooting. That's correct, Your  
02:05:05 4 Honor.

02:05:05 5 THE COURT: And what exactly was said?

02:05:06 6 MR. CARROLL: I believe the exact statement here is,  
02:05:09 7 The last they heard he was armed. If the Court would prefer,  
02:05:12 8 I believe we could put it in and play it for you.

02:05:15 9 THE COURT: I am sure you have transcripts of it. I  
02:05:17 10 will take your word for that.

02:05:20 11 MR. CARROLL: Your Honor, I do not think we have made  
02:05:22 12 a transcript specifically of this. We intend to play the  
02:05:25 13 videos rather than use a transcript just to make sure the  
02:05:28 14 record is clear.

02:05:28 15 THE COURT: I will certainly take you at your word,  
02:05:30 16 Mr. Carroll, as to what the radio traffic was.

02:05:31 17 And who made that statement?

02:05:33 18 MR. CARROLL: I believe it was Deputy Mundell, Your  
02:05:40 19 Honor. It was not -- if it's helpful to the Court, it was  
02:05:45 20 Deputy Wheeler, Deputy Wesley Wheeler, who commenced the  
02:05:50 21 pursuit in this case, and it was another deputy who chimed in  
02:05:53 22 to remind the remainder of the deputies on the chase that the  
02:05:55 23 last information was that Mr. Rhoades was armed.

02:05:58 24 THE COURT: And what's the basis for that statement?

02:06:00 25 MR. CARROLL: That is not something that I can

present here at this time, Your Honor. However, I think more important is the effect on the listener as opposed to proving the fact that Mr. Rhoades --

THE COURT: Well, right, but if I deem this evidence admissible Mr. Umina, I suspect, is going to pounce all over Deputy Mundell -- is it Mundell?

MR. CARROLL: Mundell. I believe Mundell.

THE COURT: -- as to what the basis of this statement is, that, you know, "The last I heard he was armed."

Okay. Anything further, Mr. Carroll?

MR. CARROLL: Judge, the only other comment I would make to that, Your Honor, I believe that the experts in this case would agree that the deputies are trained to provide information over the radio that is pertinent to the chase, and that is information that should be relied on by the officers who are participating.

THE COURT: All right. Okay.

Anything further, Mr. Umina?

MR. UMINA: Your Honor, they just admitted to not knowing the source of the information, the officer who transmitted it, nor the officer who stated it. And, again, I will just leave it at that. They have no idea of the source of this information.

THE COURT: No, I think you are exactly right, Mr. Umina. I think it will be a compelling cross-examination.



02:07:12 1 I will overrule plaintiff's objection for the specific basis  
02:07:16 2 of the temporal proximity to the event here. I don't believe  
02:07:20 3 it's hearsay given the stated purpose for the evidence being  
02:07:26 4 offered as to the state of mind of Defendant Forsyth, which,  
02:07:29 5 again, is the whole reason we're here.

02:07:33 6 But, of course, you will be free to cross, as necessary,  
02:07:37 7 all these witnesses.

02:07:39 8 Is Deputy Mundell slated to testify in person?

02:07:43 9 MR. CARROLL: No, Your Honor.

02:07:44 10 THE COURT: Okay. All right. Are you going to call  
02:07:51 11 him, Mr. Umina?

02:07:52 12 MR. UMINA: Your Honor, we don't have Deputy Mundell  
02:07:53 13 under subpoena. We can get him under subpoena, and get him in  
02:07:57 14 here if they attempt to proffer this, but, yeah. I mean...

02:08:02 15 THE COURT: We don't need a firm commitment. I am  
02:08:05 16 just curious.

02:08:05 17 MR. UMINA: Yeah. Yeah.

02:08:06 18 THE COURT: Understood. Objection overruled. Noted.  
02:08:09 19 I find the evidence relevant, again, to the issue that remains  
02:08:13 20 here. I think I disagree with Mr. Carroll. The Court's  
02:08:17 21 exclusion of the other evidence we talked about, specifically  
02:08:19 22 the July 25th events and incidents, I do not find it relevant  
02:08:24 23 to the issues here, and any relevance that it may have  
02:08:27 24 arguably had, was significantly and substantially outweighed  
02:08:31 25 by a number of problematic concerns with respect to the jury.

02:08:36 1 But I do believe this evidence, although far from the  
02:08:42 2 strongest, is relevant, given the foundation that's been  
02:08:46 3 proffered here today. So objection overruled, but noted.

02:08:49 4 Anything else we need to take up before we have the jury  
02:08:52 5 come back in for preliminary instructions?

02:08:55 6 MS. DURST: Yes, Your Honor. It was just something I  
02:08:56 7 wanted to make sure I put on the record before we started the  
02:08:58 8 testimony. I am well aware of the Court's order from April 4,  
02:09:02 9 that addressed the numerous of motions in limine, but I will  
02:09:06 10 kind of lump those into the July 25th incident and resulting  
02:09:09 11 criminal charges.

02:09:10 12 But I just did want to make my record that I believe with  
02:09:15 13 respect to the July 25th incident, that that information is  
02:09:19 14 relevant, given the testimony from the plaintiff's own expert  
02:09:23 15 in this case, Dennis Root. Mr. Root testified in his  
02:09:27 16 deposition that there are a number of factors that you  
02:09:30 17 consider with respect to what is or is not considered a threat  
02:09:35 18 when evaluating use of deadly force. And one of those factors  
02:09:41 19 is actions -- prior actions of the suspect. So the  
02:09:45 20 plaintiff's own expert has testified under oath in this case  
02:09:49 21 that one of the factors that you take into consideration to  
02:09:52 22 determine whether deadly force would be justified or not is  
02:09:56 23 the prior actions of the suspect, so we believe that that  
02:09:59 24 would make the July 25th incident relevant. Again, I  
02:10:04 25 understand the Court's ruling. I just wanted to note that for

02:10:06 1 the record.

02:10:07 2 And lastly, Your Honor, and then I will sit down, with  
02:10:10 3 regard to the criminal complaint filed against Mr. Rhoades  
02:10:16 4 from the July 25th incident, specifically the attempted murder  
02:10:20 5 on the police officer, I would note that that was previously  
02:10:23 6 identified by the plaintiff in the designation of joint  
02:10:29 7 exhibit that was filed with this court. So the plaintiffs  
02:10:33 8 previously identified that criminal complaint as not only  
02:10:37 9 their exhibit, but a joint designation of exhibits. So I  
02:10:41 10 think that for them now to argue that that criminal complaint  
02:10:44 11 is not relevant evidence when they previously identified it as  
02:10:48 12 an exhibit, I think there is a waiver of that argument. And I  
02:10:52 13 just wanted to note that for the record, Your Honor.

02:10:55 14 THE COURT: Record made. Motion to reconsider  
02:10:57 15 denied. Anything else?

02:10:58 16 MS. DURST: No, Your Honor.

02:10:59 17 THE COURT: Mr. Umina.

02:11:00 18 MR. UMINA: I guess, Your Honor, for vouching the  
02:11:04 19 record here, I also contacted Ms. Durst after the fact. That  
02:11:09 20 was initially when the Monell claim was in play; therefore, we  
02:11:12 21 were considering that as part of the case, you know,  
02:11:16 22 consistent with this Court's rulings and the new scheduling  
02:11:18 23 order and the lack of the Monell claims. I believe the only  
02:11:22 24 stipulated exhibit that we have now is the Marion County  
02:11:25 25 Sheriff's Department use of force policy. We have cleared

02:11:29 1 that up in advance of trial.

02:11:30 2 THE COURT: Understood. I certainly occasionally  
02:11:33 3 suffered the same misbelief that the parties agreed with  
02:11:37 4 respect to exhibits and evidence that that was the end all,  
02:11:39 5 but I would like to interject myself every now and then as  
02:11:42 6 part of my gatekeeping functions. So consider the gate kept  
02:11:46 7 for the reasons previously articulated, but the record is  
02:11:49 8 made.

02:11:49 9 Anything further?

02:11:53 10 MS. DURST: No, sir.

02:11:53 11 THE COURT: Okay. All right. With that then, if I  
02:11:56 12 could ask our court security officer to bring our jury back  
02:11:59 13 in, please. Thank you, sir.

02:13:26 14 (Jury returned to the courtroom, and the following  
02:13:31 15 transpired in open court.)

02:13:36 16 THE COURT: Thank you very much, ladies and  
02:13:38 17 gentlemen. You might be surprised how quickly you learn what  
02:13:44 18 order you are seated in. So that you know, from a logistical  
02:13:45 19 standpoint, as promised, I do have some preliminary  
02:13:48 20 instructions that we are going to go through now, and then we  
02:13:52 21 will take our afternoon break, and after that you will hear  
02:13:55 22 from counsel in this case with their opening statements. And  
02:13:59 23 then we will see where we are from that point.

02:14:02 24 We are about to commence the trial of this case. And we  
02:14:06 25 have talked a little bit about the details of the case during

our jury selection process. Before we begin the substantive phase of our trial, I do have some brief instructions about certain matters that I think will help you better understand what will be presented to you during the course of this trial. I think it will also help you to know sort of the rules of the road for you serving as jurors during the course of this trial.

These preliminary instructions are intended only to serve as an introduction to the trial of this case. They are certainly not a substitute for the more detailed instructions on the law that you will hear at the close of the evidence in this case, or the evidence you are going to receive during the course of our trial.

The parties who bring a civil action in a case like this are called plaintiffs. And in this action the plaintiff is Christy J. Rhoades. She appears in her capacity as administratrix and personal representative of the estate of Philip Jontz Rhoades.

The parties against whom a civil action is brought are called defendants. And in this case, there is one defendant, David Forsyth, in his official and individual capacity.

As I explained during our jury selection process, this is a civil case. The case will proceed in the following order: Counsel for the plaintiffs may make an opening statement outlining their client's case. Counsel for the defendant may

02:15:27 1 then make an opening statement, or they could defer their  
02:15:30 2 opening statement until the conclusion of the plaintiff's  
02:15:32 3 case. Neither party is required to make an opening statement.

02:15:37 4 I do need you to understand what a party says in an  
02:15:39 5 opening statement is not evidence. Instead, the opening  
02:15:44 6 statement is designed to give the lawyers a chance to  
02:15:46 7 introduce to you the evidence that that party intends to  
02:15:51 8 produce or introduce during the course of this trial.

02:15:55 9 After opening statements, counsel for the plaintiff will  
02:15:57 10 then proceed to introduce evidence in support of their claim.  
02:16:01 11 At the conclusion of the plaintiff's case, the defendant may  
02:16:04 12 introduce evidence. The defendant, however, is not obligated  
02:16:07 13 to introduce any evidence or to call any witnesses. If the  
02:16:11 14 defense does introduce evidence, however, plaintiff's counsel  
02:16:14 15 may then introduce rebuttal evidence in response.

02:16:18 16 Following the conclusion of all the evidence, I will  
02:16:20 17 instruct you as to what the law is that applies to this case.  
02:16:25 18 The parties will then present closing arguments, telling you  
02:16:28 19 what they believe the evidence has shown, and what inferences  
02:16:31 20 they believe you as jurors can and should draw from the  
02:16:34 21 evidence. Again, what is said in closing arguments, just like  
02:16:38 22 opening statements, is not evidence. The arguments are  
02:16:41 23 designed to present to you the contentions or positions of the  
02:16:44 24 parties based upon the evidence produced during the trial.  
02:16:49 25 The plaintiffs have the right to start and end closing

arguments.

After the instructions and arguments are concluded, you will then retire to the jury room to consider your verdict. You are to determine the facts of this case from all of the testimony that you hear and such other evidence as is submitted during the course of this trial. You are the sole and exclusive judges of the facts of this case. And in that field neither this Court nor anyone else may invade your province. On the other hand, and I emphasize this, you are bound to accept the rules of law as set forth in my instructions to you, whether you agree with those rules of law or not, whether you believe the law should be other than what is stated in this Court's instructions.

Under the law of the United States, a trial judge is permitted to comment on the evidence in the case, either during the course of the trial or while instructing the jury at the conclusion of the trial before you retire to consider your verdict. Those comments by the Court are only expressions of that Court's opinion as to the facts. And on such occasions the Court may comment on the evidence of the case, you are at liberty to disregard the comments entirely because in the final analysis, again, you jurors are the sole judges of the facts.

As the sole judges of the facts of this case you must determine which of the witnesses you believe, what portion of

their testimony you accept, and what weight you attach to it.

During the course of the trial, you will undoubtedly hear objections to some of the evidence that is offered. Sometimes these objections may be argued outside of your presence. It is the duty of an attorney in a case to object when the other side offers testimony or other evidence which the attorney objecting believes is not properly admissible under the rules of evidence. You should not draw any inference against or show any prejudice against an attorney or his or her client because of the making of an objection to testimony or other evidence that is offered.

If I allow testimony or other evidence to be introduced over the objection of an attorney, I am not, unless I expressly say so, indicating any opinion as to the weight of such evidence, or the effect of that evidence.

You, as the jurors, are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

Whenever I sustain an objection to a question addressed to a witness, you must disregard the question entirely, and should draw no inference from the wording of it, or speculate as to what the witness would have said if he or she would have been permitted to answer that question.

At times during this trial, the Court may direct that certain testimony or other evidence be stricken from the



record. I will instruct you to disregard this evidence. You must not consider any evidence which has been stricken from the record or which you have been instructed to disregard. Your verdict must be based solely on legally admissible evidence. The evidence as this Court excludes from your consideration is excluded because it is not legally admissible.

The law does not, however, require you to accept all of the evidence that is admissible, even though it may be competent. In determining what evidence you accept, you must first make your own evaluation of the testimony given by each witness. You must determine the degree of weight you choose to give to the testimony of each witness. The testimony of a witness may fail to conform to the facts as they occur because the witness is intentionally telling a falsehood, or because the witness did not accurately see or hear that about which the witness testified, or because the witness' recollection of the event is faulty, or because the witness does not express himself clearly while testifying before you here in court. There is no magic formula by which you must or may evaluate testimony.

You bring with you to this courtroom all of the experience and background of your lives. In your everyday affairs you determine for yourselves the reliability or unreliability of statements made to you by others. The same

1 tests that you use in your everyday dealings are the tests  
2 which you must and should apply in your deliberations as a  
3 juror.

4 The interest or the lack of interest of any witness in  
5 the outcome of this case, the bias or prejudice of each  
6 witness, if there be any, the age, appearance, manner in which  
7 each witness testifies while on the witness stand, the  
8 opportunity that each witness had to observe the facts  
9 concerned to which the witness testifies, the probability or  
10 improbability of the witness' testimony when viewed in light  
11 of all of the other evidence in the case are all matters to be  
12 taken into your determination in determining the weight, if  
13 any, you will assign to each witness' testimony.

14 If such consideration make it appear there is a  
15 discrepancy in the evidence, you will first have to consider  
16 whether the apparent discrepancies may not be reconciled by  
17 fitting the two stories together. If, however, that is not  
18 possible, you will then have to determine which of the  
19 conflicting versions you will accept.

20 You are not permitted to ask questions of witnesses or of  
21 the attorneys. Therefore, please do not interrupt the  
22 attorneys during their examination of witnesses or otherwise.  
23 If, however, you are unable to hear a witness or lawyer,  
24 please raise your hand and I will take care of it.

25 You must not consider anything you may have read or heard

about this case or the issues raised in this case outside of the courtroom.

You will not be required to remain together while the Court is in recess or adjournment during the course of this trial. Therefore, it is important that you listen carefully and obey faithfully the following instructions with regard to recess and adjournment of court during the trial of this case.

Do not discuss this case either among yourselves or with anyone else during the course of the trial. In fairness to the parties to this civil action, you should keep an open mind throughout the trial, reaching your conclusion only during final deliberations after all the evidence has been submitted, and after you have heard the final summations of counsel, and after the Court has instructed you as to the law; then and only then, after you have had an opportunity to interchange views with other members of the jury. Do not permit any third persons to discuss the case in your presence or with you. And if anyone attempts to discuss the case with you despite your telling that person not to do so, please report these facts to the Court as soon as possible. It is not necessary that you report these facts, or the fact you felt it necessary to bring a matter to the attention of the Court, to any of your fellow jurors. This includes curious family members, roommates, and the like when you get home in the evening. Please blame me for being rude and saying, "I can't talk about it."

1 Although it is not normal human tendency to converse with  
2 people with whom one is thrown into contact, you must not,  
3 during the time you serve on this jury, converse, whether in  
4 or out of the courtroom, with any of the parties, their  
5 attorneys, or any witness. By this the Court means not only  
6 should you avoid talking or conversing about the case, but do  
7 not talk or converse at all, even in passing the time of day.  
8 In no other way can all parties be assured of your absolute  
9 impartiality, and your absolute impartiality in the matter  
10 that all parties are entitled to from you as jurors.

11 In this district court it is a rule of court that after  
12 the conclusion of a trial, neither the parties nor their  
13 agents or attorneys shall communicate or attempt to  
14 communicate concerning the jury deliberation or verdict, to  
15 any member or members of the jury before which the case is  
16 tried. Accordingly, it would be improper for you to discuss  
17 this case with anyone after the trial has ended as to jury  
18 deliberation or verdict unless, of course, you are directed to  
19 do so by order of this Court.

20 If you wish, you may take notes to help you remember what  
21 witnesses said. If you do take notes, please keep them to  
22 yourself until you and your fellow jurors go to the jury room  
23 to decide this case. Do not let note taking distract you so  
24 that you do not hear answers or observe witnesses. When you  
25 leave the courtroom, please feel free to leave your notes on

your chair, face down. Notes are not entitled to any greater weight than the memory or impression of each juror as to what the testimony may have been. Whether you take notes or not, each of you must form or express your own opinion as to the facts of this case. If you do not take notes, you should rely upon your own memory of what was said and not be influenced by the notes of other jurors.

In conclusion, please keep a few key principles in mind as we begin this trial. Your job is to decide all of the factual issues in this case, like who should be believed and who should not be believed. I will take care of all of the legal questions, such as what testimony or exhibits are received into evidence and which are not received. Please do not concern yourselves with the legal questions.

Again, please do not discuss the case with anyone. And keep an open mind until all the evidence has been received here in this courtroom. At that time, I will be able to give you your complete and final instructions which will be more detailed than these preliminary instructions; then and only then will you be fully prepared to begin your deliberations, and reach your verdict.

Any motion to sequester witnesses?

MR. UMINA: Yes, Your Honor. I would make a motion to sequester the witnesses.

THE COURT: Any objection or dispute?

02:26:36 1 MS. DURST: No, Your Honor, just with the exception  
02:26:42 2 of expert witnesses to be able to sit in. Aside from that, I  
02:26:44 3 have no objection to exclusion of witnesses, and would join in  
02:26:47 4 that motion.

02:26:48 5 THE COURT: Mr. Umina.

02:26:50 6 MR. UMINA: We agree with the same, Your Honor.

02:26:51 7 THE COURT: All right. The Court will grant the  
02:26:53 8 unopposed joint motion then, and all witnesses, other than  
02:26:56 9 experts, shall be excluded and sequestered from the courtroom.  
02:27:00 10 The Court will rely extensively on counsel to police that.  
02:27:06 11 You all know who your witnesses are and I may not. So I will  
02:27:10 12 rely on counsel to do that.

02:27:12 13 Ladies and gentlemen, I know I indicated we would  
02:27:14 14 probably take a break before openings, but we were more  
02:27:18 15 efficient in getting through our preliminary instructions.  
02:27:20 16 Unless anyone needs a break, raise your hand if you do, we  
02:27:23 17 will jump right into opening statements.

02:27:26 18 All right. Seeing no requests, Mr. Umina, do you need a  
02:27:29 19 moment to get set up?

02:27:32 20 MR. UMINA: May we just have a couple minutes, Your  
02:27:34 21 Honor?

02:27:34 22 THE COURT: Certainly. Certainly.

02:28:20 23 MR. PRINCE: May it please the Court, opposing  
02:28:22 24 counsel.

02:28:23 25 Ladies and gentlemen, if the Jeep was not in gear, Philip

1 should still be here. This is a case about a simple truth.

2 Vehicles in neutral do not accelerate. This case concerns the  
3 unlawful killing of an unarmed man as he sat inside a  
4 motionless Jeep in a small clearing in rural Marion County.

5 In total, the evidence will be that the defendant fired  
6 seven shots into the front of the Jeep occupied by  
7 Philip Rhoades, one of which struck him in the face, lodged  
8 itself in his C spine, severing his spinal column, instantly  
9 rendering Philip unable to move from the neck down as he bled  
10 to death in the final minutes of his life.

11 What brings us to this United States federal courthouse,  
12 are the protections found under the Fourth Amendment of the  
13 United States Constitution. Protections that shield us all  
14 from an unlawful killing at the hand of the government. These  
15 safeguards tell us that the government and its police  
16 officers, are not permitted to be the judge, the jury, and the  
17 executioner.

18 The evidence in this case will be that police officers  
19 are not allowed to knowingly violate citizens' constitutional  
20 rights. The evidence will also be that police officers must  
21 comply with the policies of their department. And the  
22 evidence will be in this case that these are basic rules of  
23 policing. These protections, these foundational protections  
24 like all constitutional protections, only matter if juries  
25 like you choose to enforce them and hold accountable all whom

are proven to violate them.

The Court will instruct you that if government actors, like the police, violate the Fourth Amendment, they are liable and must pay for the harm they have caused. The evidence in this case will be that whether it be constitutional rights that protect every American, or local rules that protect the good people of Marion County, to the defendant they are nothing more than words on a page. We will prove to you that when these safeguards are ignored and broken, there is nothing left to stand between an officer and his gun.

My name is Travis Prince, and together with Ryan Umina and Ben Hogan, we represent the family of Philip Rhoades. Philip's wife, Christy, will be sitting with us here during the trial. Philip's father, Rick, will be here as well when he is able to be here. I hope you understand that given the facts that will be discussed and what happened to Philip, that his two minor children will not be here for the proceedings.

Together, we are all seeking in this trial what the evidence will show was denied by the defendant in that Marion County field, and that is justice for Philip.

This heartbreaking story begins on August 2, 2017, when the defendant was on patrol with Deputy Love, Corey Love. And they observed a black Jeep Wrangler pass in oncoming traffic, that was driven by Philip Rhoades. The defendant followed that black Jeep into rural Marion County, and that lead to a



02:33:28 1 dirt road.

02:33:33 2 The evidence will be that that dirt road led to a small  
02:33:37 3 gas well. And the evidence in this case will show that upon  
02:33:43 4 entering that small clearing, the defendant jumped from his  
02:33:48 5 still-moving police cruiser, he did not bother to place it in  
02:33:55 6 park, and that within seconds, the evidence will show that  
02:33:59 7 within seconds, the defendant pulled his .40-caliber pistol  
02:34:05 8 from its holster, positioned himself directly in front of the  
02:34:10 9 Jeep where he had the clearest possible shot, and he took it.  
02:34:18 10 Not one, ladies and gentlemen, but one, two, three, four,  
02:34:28 11 five, six, seven. Seven shots were fired by the defendant at  
02:34:35 12 the front of that Jeep.

02:34:36 13 Now, we will prove to you, we will prove to you that  
02:34:40 14 standing in front of that Jeep was in violation of the  
02:34:43 15 defendant's training. We will prove to you that the defendant  
02:34:47 16 had no reason to open fire on that Jeep. The evidence will be  
02:34:54 17 that none of that mattered. Because the evidence will show  
02:34:59 18 that the defendant had no intention of arresting Philip.  
02:35:04 19 Within seconds of exiting his police cruiser, the entire event  
02:35:09 20 was over.

02:35:12 21 It didn't matter that the defendant knew the rules he was  
02:35:15 22 required to follow. Because the evidence will show that the  
02:35:20 23 defendant's mind was made up when he drove down that dirt  
02:35:26 24 road. He was the judge. He was the jury. He was the  
02:35:34 25 executioner.

02:35:37 1 One of the shots fired by the defendant struck  
02:35:41 2 Mr. Rhoades near his right ear. As I mentioned before,  
02:35:48 3 importantly there is no exit wound. Instead -- instead,  
02:35:56 4 ladies and gentlemen, the bullet lodged itself in Philip's  
02:36:02 5 neck, fracturing the C1 vertebra, the vertebra at the top of  
02:36:07 6 your C spine, and severing his spinal cord. This is  
02:36:14 7 important. This is important.

02:36:16 8 The evidence in this case will show that because his  
02:36:19 9 spinal cord was severed, Philip was instantly unable to move  
02:36:25 10 his body below the neck. We will prove that Philip's instant  
02:36:34 11 loss of the ability to move his arms, his hands, and his legs  
02:36:41 12 rendered him unable to shift the gears of that Jeep, and  
02:36:46 13 rendered him unable to use the accelerator.

02:37:02 14 The evidence in this case will show that the defendant  
02:37:05 15 knew what he did was wrong. And worse yet, ladies and  
02:37:10 16 gentlemen, we will introduce evidence that he tried to cover  
02:37:15 17 it up.

02:37:20 18 But when did we first learn of the defendant's version of  
02:37:24 19 what happened in that small field? Well, the evidence will  
02:37:29 20 tell us that it wasn't on August 2d when this happened. The  
02:37:38 21 investigating state trooper will testify that when he went to  
02:37:42 22 speak with the defendant, the defendant refused to cooperate,  
02:37:48 23 refused to make a statement.

02:37:52 24 The evidence in this case will also be that when the  
02:37:55 25 investigating state trooper went to speak with Corey Love, the

02:38:00 1 other officer that was present, Deputy Love also advised he  
02:38:09 2 wasn't cooperating. He wasn't going to give a statement.

02:38:15 3 As you listen to the evidence in this case, ladies and  
02:38:17 4 gentlemen, you will have to ask yourself: If the defendant  
02:38:22 5 thought his killing of Philip was justified, why didn't he  
02:38:27 6 just explain to the trooper what happened?

02:38:36 7 The evidence, ladies and gentlemen, will answer that  
02:38:39 8 question for you. That's because the evidence in this case  
02:38:45 9 will show -- the evidence in this case will show that the --  
02:38:55 10 that the defendant and Deputy Love wanted to get together.  
02:39:03 11 The defendant -- the defendant and Deputy Love told -- the  
02:39:09 12 evidence will be that the defendant and Deputy Love made it  
02:39:13 13 known to the investigating state trooper that they wanted to  
02:39:16 14 get together before they gave their statement. We will prove  
02:39:22 15 to you that the defendant needed a story, some explanation for  
02:39:30 16 this killing of Philip. And that he needed to make sure  
02:39:37 17 Deputy Love, the rookie officer, towed the line before  
02:39:43 18 speaking with the state trooper. In fact, you will hear from  
02:39:48 19 Deputy Love that the defendant asked him for a copy of his  
02:39:51 20 written statement.

02:39:53 21 But the evidence in this case will also show that even  
02:39:57 22 though the defendant and Deputy Love had clearly spoken before  
02:40:03 23 they gave their statements to the state trooper, the defendant  
02:40:09 24 will take that witness stand, and he is going to tell you a  
02:40:13 25 different story. He will tell you that he didn't have any

discussions with Corey Love after August 2nd. In fact, he will tell you that he didn't have a single phone call, not a single text, and no communication whatsoever.

Ladies and gentlemen, we are going to prove to you that statement is false. We will prove to you that the state trooper is correct, that the defendant and Deputy Love did speak about the killing before making their official statement. And we will prove to you that they did so to get their story straight. Which brings us to the defendant's story.

The evidence will show that after extensive preparation and scheming, the defendant came up with the following story: The defendant is going to tell you on this witness stand, he is going to testify that even though he never saw Philip with any weapons, the sole justification for his use of lethal deadly force was that that black Jeep Wrangler we just talked about, started to drive straight at him. In fact, he is going to testify that it came towards him in an aggressive manner, that his foot was heavy on the gas, and he was coming at me.

Ladies and gentlemen, we will prove to you that when the defendant made this false statement to cover up what happened, he failed to take one key fact into account. The Jeep, the black Jeep Wrangler, was a five speed. The evidence in this case will be that the Jeep was still running when Philip's limp body was removed. It was still running, in fact, when

the investigating state trooper arrived on the scene several minutes later, and the vehicle was unoccupied. And the evidence will be that after the killing, no one tampered with the Jeep. Five speeds are only able to run unoccupied if they are in neutral. That will be the evidence in this case. Remember, Philip was unable to move his body below his neck and would not have been able to shift the Jeep into neutral. As a result, the evidence in this case will be that the Jeep was in neutral when the defendant killed Philip, and thus, not moving as the defendant claims.

You know what, folks? You don't have to take our word for it. You don't. Because the evidence in this case will be -- the defendant is going to take this witness stand, and he is going to testify that in order for a manual transmission to be running, just sitting in an area, it would have to be in neutral. In fact, the defendant himself is going to testify that a car with a manual transmission that is in gear will stall out if there is no one holding the clutch or if it's just sitting there. Anyone who has ever learned to drive a five speed will agree that that's the case.

Ladies and gentlemen, common sense tells us that vehicles in neutral do not aggressively accelerate. But we don't intend to rely on common sense alone. In fact, there will be no objective evidence that this Jeep moved in the manner the defendant claims. What I mean by that is, there will be no

02:44:54 1 evidence of ground disturbance to suggest this Jeep took off  
02:45:00 2 and came towards him. There will be no evidence of spinning  
02:45:06 3 tires, rocks, debris, mud, that were flung up by his Jeep.  
02:45:10 4 There will be no evidence, whatsoever, that this Jeep ever  
02:45:16 5 accelerated at all.

02:45:21 6 We will prove to you, ladies and gentlemen, that if the  
02:45:24 7 Jeep was not in gear, Philip Rhoades should still be here.  
02:45:34 8 But again, you don't have to take our word for it. The  
02:45:38 9 defendant's expert witness that they paid to come in here and  
02:45:42 10 testify, he is going to testify that if the vehicle was not in  
02:45:46 11 motion, the use of force, the use of deadly force in this case  
02:45:54 12 wasn't justified. The West Virginia state trooper that  
02:45:59 13 investigated this case, he is going to come in here and  
02:46:02 14 testify that if the vehicle was not in motion, the use of  
02:46:07 15 force was unjustified.

02:46:14 16 As I mentioned previously the founding fathers of this  
02:46:17 17 great nation made sure to include basic rights for all  
02:46:22 18 Americans in the Constitution. We know it as the Bill of  
02:46:26 19 Rights. This is where we find the right to freedom of speech,  
02:46:33 20 the right to bear arms, and included therein, is a right to be  
02:46:38 21 free from an unreasonable seizure of your person, an unlawful  
02:46:44 22 killing at the hands of your government. But this case isn't  
02:46:53 23 only about constitutional rights. It concerns Marion County  
02:47:00 24 Sheriff's Department policies and procedures that are intended  
02:47:03 25 to protect the people of Marion County like Philip.

02:47:11 1 The evidence in this case will show and we will prove to  
02:47:16 2 you that the defendant violated the Marion County Sheriff's  
02:47:20 3 Department use of lethal force policy by using lethal force  
02:47:27 4 when it wasn't authorized, by using lethal force on an unarmed  
02:47:33 5 man in a motionless Jeep.

02:47:39 6 We will prove to you that the defendant violated the  
02:47:42 7 Fourth Amendment, that the defendant violated the use of force  
02:47:46 8 policy, that the defendant is a rule breaker.

02:47:52 9 Now, folks, we will make your job as jurors as easy as  
02:47:58 10 possible. We will provide ample evidence that an unlawful,  
02:48:06 11 unjustified killing took place, and the sloppy coverup that  
02:48:11 12 followed, that much will be firmly established. The only  
02:48:16 13 difficult question that you will be asked to answer in this  
02:48:21 14 case will be: What is the value of a human life? What is the  
02:48:27 15 value when a father buries his son, when a wife loses the  
02:48:37 16 father of her two minor children, or when two young children  
02:48:46 17 lose their 28-year-old father?

02:48:50 18 There will be birthday parties, T ball games, weddings,  
02:48:55 19 and countless life events where a father's wisdom will be  
02:49:00 20 absent. The value of that missing piece, ladies and  
02:49:07 21 gentlemen, will be the only difficult question you will be  
02:49:10 22 asked to answer in this case, because, ladies and gentlemen,  
02:49:17 23 we will prove that the defendant unlawfully killed Philip,  
02:49:23 24 which sounds like a problem. We want to make sure that you  
02:49:27 25 understand the appropriate legal standard by which to judge

our claims in this case. We are not required to prove our allegations a hundred percent, for example. We are not required to prove these allegations beyond a reasonable doubt. Instead, the Judge will instruct you that you are to use the preponderance of the evidence standard when you evaluate our allegations in this case. What does that mean exactly? It means this: When you combine all of the evidence in this case, if more than 50 percent is in the plaintiff's favor, you must find for the plaintiff.

Think of it this way: We are going to start this case right now on one side of the football field. In order for the plaintiff to prevail in this case, you don't have to score any touchdowns. You don't have to score any points or field goals. All we have to do to prevail in this case, is get the tip of the football across the 50-yard line.

The Bill of Rights to the United States Constitution is just that, a list of rights that were guaranteed to all Americans hundreds of years ago and passed on to all of us, including Philip, for generations. The right to be free from an unlawful killing at the hands of our government is among the most important rights that we have been given as Americans, forever insuring that life and liberty are to be protected forever. These safeguards tell us that when -- that the government is not permitted to be the judge, the jury, and the executioner. And certainly is not permitted to cover it



up, to lie to cover it up.

We will prove to you -- we will prove to you that the defendant had no reasonable reason to fear for his safety when he broke these rules, took justice into his own hands, and gunned down Philip in broad daylight as he sat behind the wheel of this motionless Jeep. Because we know -- we know if the Jeep was not in gear, Philip should still be here.

Thank you, Your Honor.

THE COURT: Thank you, counsel.

Ms. Durst, do you still anticipate taking the same amount of time we discussed before?

MS. DURST: Right around there, sir.

THE COURT: If you are prepared to proceed, why don't you go ahead then. Take your time getting set up.

MS. DURST: May it please the Court, counsel.

Good afternoon, ladies and gentlemen of the jury. I first want to start by thanking you for your service here today. I know it feels like it has been a long day already, but we couldn't do our jobs if you guys weren't here doing your jobs, so I want to take the opportunity to thank you in advance.

We don't see this as a difficult, complicated case. This is a case that does not present a complicated set of facts. This is a case about whether Deputy David Forsyth, a member of the Marion County Sheriff's Department who, along with Mr.

02:53:55 1 Carroll, we have the pleasure of representing, whether  
02:53:58 2 Deputy Forsyth was going to get to go home to his wife and  
02:54:02 3 three young children at the end of his shift on August 2nd of  
02:54:06 4 2017.

02:54:11 5 So how did we get here? On August 2nd of 2017,  
02:54:16 6 Deputy Forsyth was on duty as a deputy with the Marion County  
02:54:22 7 Sheriff's Department. He was travelling with another young  
02:54:26 8 man, who was a deputy with the sheriff's department at the  
02:54:31 9 time, who is in longer with the sheriff's department, a  
02:54:33 10 gentleman by the name of Corey Love. They were on duty with  
02:54:38 11 the sheriff's department when they responded to assisting in a  
02:54:45 12 pursuit of -- to assist another deputy with the sheriff's  
02:54:52 13 department, Deputy Wesley Wheeler, in the pursuit of a vehicle  
02:54:55 14 that was driven by Philip Rhoades.

02:54:58 15 So Deputy Wheeler was involved in a pursuit. Deputy  
02:55:03 16 Forsyth along with Deputy Love begin to assist in the pursuit  
02:55:06 17 of that vehicle. Mr. Rhoades was believed to have been  
02:55:12 18 driving a black, soft top, Jeep Wrangler. You have obviously  
02:55:19 19 seen the photographs of the Jeep. That was the information  
02:55:21 20 that came over the radio, that Mr. Rhoades was believed to be  
02:55:24 21 driving that vehicle. It was also noted over the radio  
02:55:29 22 traffic that the last information that had been heard was that  
02:55:34 23 Mr. Rhoades may be armed.

02:55:37 24 So Deputy Forsyth and Deputy Love begin to assist in the  
02:55:42 25 pursuit. They had been at the station, at the sheriff's

department in Marion County, heard the information come over the radio, and went to assist in the pursuit. They get to Route 250. They were traveling north, which is right around the North Marion High School area.

At that point in time, Deputy Forsyth witnessed a Jeep that was matching the description that had come over the radio; that it was a black Jeep, soft top, Wrangler. So Deputy Forsyth sees that vehicle while he is traveling north on Route 250. He attempts to assist in the pursuit, to turn around to pursue the Jeep. At that point in time, Deputy Forsyth saw that Jeep swerve into oncoming traffic, almost strike another vehicle while the Jeep was attempting to pass other vehicles in an attempt to flee.

Deputy Forsyth then radioed to another deputy over the radio, and this deputy was believed to be in that same general area on Route 250 near the Carnegie area. Deputy Forsyth asked if this other deputy had seen the Jeep that had passed him in that area. That deputy came across the radio and said, no, he has not seen the Jeep. You are going to hear some of this radio traffic as well, so it's not just me or it won't just be Deputy Forsyth telling you, you will hear the actual radio traffic from the officers as they are reporting things.

So having been told by the deputy that the Jeep had not gone in that area, Deputy Forsyth then went out on East Run onto Parrish Run in that area of Marion County. At that

02:57:44 1 point, he and Deputy Love had lost sight of the Jeep.

02:57:52 2 There was a private passenger vehicle in that area.

02:57:55 3 There was a female in her own personal automobile in that area  
02:57:59 4 that Deputy Forsyth had to allow to pass so they could

02:58:03 5 continue on for this Jeep that Mr. Rhoades was driving. Once

02:58:09 6 the civilian was out of the way, Deputy Forsyth and

02:58:15 7 Deputy Love checked with what appeared to be like an access

02:58:20 8 road or a trail in a kind of a sharp turn off of Parrish Run.

02:58:28 9 As Deputy Forsyth's cruiser kind of pulled onto that

02:58:33 10 access road -- and the reason I'm calling it an access road,

02:58:35 11 is that is a gas well site. So Deputy Forsyth is in his

02:58:40 12 cruiser, which is marked, that identifies he is with the

02:58:43 13 Marion County Sheriff's Department. He pulls into that access

02:58:48 14 road. It was somewhat of a grown-up area that kind of opens

02:58:52 15 up into the gas well site. By no means -- and you will see

02:58:57 16 the photographs -- by no means an open area. Somewhat

02:59:01 17 confined. And you will see some of the apparatuses for the

02:59:03 18 gas well. Deputy Forsyth actually saw the Jeep backed into

02:59:10 19 the gas site kind of adjacent off to the left. So

02:59:16 20 Deputy Forsyth's cruiser comes in. The Jeep is off to the

02:59:19 21 left, backed in, somewhat adjacent to the cruiser.

02:59:24 22 At that point in time, Deputy Forsyth is coming into that

02:59:29 23 gas site, Mr. Rhoades' Jeep actually comes forward toward the

02:59:36 24 cruiser almost striking the cruiser that Deputy Forsyth was

02:59:40 25 driving. At that point in time, Deputy Forsyth will tell you

02:59:46 1 this is what he saw, and this is the information that he  
02:59:49 2 actually provided to, then sergeant, now Lieutenant Branham  
02:59:55 3 with the West Virginia State Police. He saw the Jeep  
03:00:01 4 actually, what he has described, as kind of do a three-point  
03:00:07 5 turn, like the Jeep was trying to back up in order to get out  
03:00:09 6 of the area and try to turn around.

03:00:11 7 At that point in time Deputy Forsyth exited his cruiser,  
03:00:16 8 obviously on the driver's side, because he was the one driving  
03:00:19 9 the cruiser. Deputy Forsyth [sic] was on the passenger's  
03:00:22 10 side. Deputy Forsyth exited the cruiser with the intention of  
03:00:26 11 kind of going to the rear of his cruiser in an effort to try  
03:00:31 12 to stop this Jeep that was being pursued by the Marion County  
03:00:36 13 Sheriff's Department. He didn't make it to the rear of the  
03:00:41 14 cruiser because, unbeknownst to him, when he exited the  
03:00:47 15 cruiser, he didn't have the cruiser in park. So that cruiser  
03:00:50 16 continued to move forward actually away from Deputy Forsyth,  
03:00:56 17 so he wasn't able to get to the rear of the cruiser where he  
03:00:59 18 had intended to go.

03:01:01 19 Now, as I noted, that cruiser, and you have seen the  
03:01:04 20 photos, it's clearly marked as a cruiser with the Marion  
03:01:08 21 County Sheriff's Department. As Deputy Forsyth got out of his  
03:01:13 22 cruiser, the cruiser is continuing to move forward, he gives  
03:01:19 23 verbal, loud commands to Mr. Rhoades. Stop the vehicle, show  
03:01:25 24 me your hands. Stop the vehicle, show me your hands.  
03:01:31 25 Mr. Rhoades did not comply with those commands at all.

At that point in time, Deputy Forsyth then saw what -- it looked like the Jeep was backing up at the same time he saw Mr. Rhoades appearing to be reaching for the floorboard or the center console of the vehicle. Remember, the evidence is going to be over the radio it indicated that Mr. Rhoades may still be armed. That is the information that Deputy Forsyth had at the time as he sees Mr. Rhoades reaching for the floorboard or the center console. Deputy Forsyth continues to give verbal commands to Mr. Rhoades. Stop the vehicle, show me your hands. Stop the vehicle, show me your hands.

Again, Mr. Rhoades failed to comply with those lawful commands of a law enforcement officer. Instead, at that point in time, Mr. Rhoades, -- and Deputy Forsyth will describe and tell you, that he heard Mr. Rhoades get on the gas, heard the engine revving, and saw the Jeep coming toward him in that area that you have and will see at the gas well site. Even at that time, Deputy Forsyth is continuing to give those verbal commands to try to get Mr. Rhoades to comply and stop the Jeep. Mr. Rhoades, again, did not comply, and he continued to drive that Jeep directly at Deputy Forsyth.

At that point in time, Deputy Forsyth had a reasonable belief that he was going to be seriously injured or killed by this Jeep running at him, and he discharged his weapon. And you have seen the entry area of the Jeep. He discharged the weapon, and he will tell you, until the threat was stopped.

03:03:49 1 He discharged the weapon until the Jeep stopped moving at him.

03:03:55 2 At that point in time, deputy -- actually Deputy Forsyth  
03:04:00 3 radioed. You will hear him come over the radio and says,  
03:04:05 4 Marion, shots fired, shots fired. He also then calls for an  
03:04:10 5 ambulance. He and Deputy Love remove Mr. Rhoades from the  
03:04:16 6 Jeep and begin to administer -- they did not find any pulse,  
03:04:22 7 and they begin to administer CPR.

03:04:27 8 At that point in time, obviously the call has gone over  
03:04:31 9 the radio, and so there will be other deputies and first  
03:04:34 10 responders coming to the scene. The West Virginia State  
03:04:39 11 Police is called upon to investigate this incident. And as I  
03:04:44 12 indicated, it was Sergeant Branham -- he is now a lieutenant  
03:04:49 13 with the West Virginia State Police -- conducts the  
03:04:52 14 investigation, and takes statements from Deputy Forsyth and  
03:04:56 15 Deputy Love.

03:04:57 16 You heard Mr. Prince's opening statement about the timing  
03:05:02 17 of when Deputy Forsyth and Deputy Love gave statements to the  
03:05:09 18 state police. Interestingly, the evidence is also going to be  
03:05:14 19 from the plaintiff's own expert, the expert they have hired  
03:05:19 20 and they have paid, that -- and his name is Dennis Root --  
03:05:22 21 that he has no issue with the timing of when Deputy Forsyth  
03:05:26 22 and Deputy Love both gave statements. In fact, he will take  
03:05:31 23 the witness stand -- I have had the opportunity to question  
03:05:35 24 him under oath in this case previously, so I have his  
03:05:38 25 testimony -- and he should take the witness stand and tell you

03:05:41 1 he has no issue with that whatsoever. In fact, he would  
03:05:45 2 instruct his folks not to give statements at least for 48  
03:05:50 3 hours, and that they should maybe contact a reputable  
03:05:54 4 attorney. So the information that was conveyed in the opening  
03:05:56 5 statement to try to create some nefarious conduct on the  
03:06:00 6 timing of when Deputy Forsyth and Deputy Love gave statements,  
03:06:06 7 will be directly refuted by the plaintiff's own expert in this  
03:06:11 8 case.

03:06:13 9 You will also hear testimony from Deputy Love, who I  
03:06:19 10 indicated is no longer with the sheriff's department. He is  
03:06:22 11 not available to be here, so his testimony will be presented  
03:06:27 12 to you by way of video. We took his testimony in this case at  
03:06:32 13 a prior time, and so it will be played for you. So you will  
03:06:36 14 also get to hear Deputy Love's testimony. What you have to  
03:06:41 15 remember when you listen to his testimony and watch it, that  
03:06:46 16 he is exiting the cruiser and you will hear him say -- he  
03:06:50 17 exited the cruiser from the passenger's side and was  
03:06:55 18 attempting to get around the front of the cruiser. However,  
03:06:57 19 as he was trying to get past the front of the cruiser, the  
03:07:01 20 cruiser was continuing to move, so his perspective of what he  
03:07:04 21 was seeing, and Deputy Forsyth's perspective of what he was  
03:07:09 22 seeing, will be different because each was in a different  
03:07:12 23 location.

03:07:13 24 But Deputy Love will tell you in his deposition that will  
03:07:17 25 be played, that when they entered the clearing, they saw the



03:07:21 1 Jeep moving toward the cruiser. He also will tell you that he  
03:07:25 2 thought Deputy Forsyth was going to be struck by that Jeep.  
03:07:30 3 He did not see the shots. He heard the shots. He was still  
03:07:37 4 trying to get around the front of the cruiser. What he was  
03:07:41 5 able to see was part of the top of the Jeep moving because it  
03:07:46 6 was higher than the cruiser. So he was able to see not the  
03:07:50 7 complete Jeep, but he was able to see the Jeep moving in a  
03:07:54 8 forward-moving direction toward Deputy Forsyth. And he will  
03:07:59 9 tell you that he thought Deputy Forsyth was going to be struck  
03:08:03 10 by that Jeep. You will hear from Sergeant Branham, who  
03:08:08 11 completed the investigation by the state police. He took the  
03:08:13 12 statements from Deputy Forsyth and Deputy Love on August 4.  
03:08:18 13 You will hear that he had the opportunity to question them.  
03:08:22 14 That neither of them refused to answer any questions. All the  
03:08:27 15 information he inquired of them they answered. And you will  
03:08:31 16 hear his testimony with regard to the facts that he developed  
03:08:35 17 as a result of that investigation.

03:08:38 18 You are also going to hear, as you have probably now  
03:08:42 19 assumed, from competing expert witnesses in this case. As I  
03:08:47 20 told you, you will hear from the plaintiff's expert, who I  
03:08:51 21 have already mentioned, but you will also hear from an expert  
03:08:54 22 on behalf of the defendant, Mr. -- Deputy Forsyth -- a  
03:08:58 23 gentleman by the name of Sam Faulkner. Mr. Faulkner has a  
03:09:04 24 number of years of experience in law enforcement, and has  
03:09:08 25 conducted a number of studies over the past several years with

03:09:14 1 regard to the use of force and when the use of force is  
03:09:16 2 justified. And those studies have surveyed thousands of  
03:09:21 3 individuals, some law enforcement, some correctional officers,  
03:09:26 4 some private citizens like yourselves, to determine at what  
03:09:31 5 point in time and under what circumstances appropriate force  
03:09:36 6 or use of deadly force is appropriate.

03:09:39 7 Mr. Faulkner has that background and has used that  
03:09:45 8 background to formulate the opinions that he has in this case.  
03:09:50 9 I point that out because when you listen to the plaintiff's  
03:09:57 10 expert, I want you to keep that in mind, that he doesn't have  
03:10:00 11 that same background with regard to conducting those studies  
03:10:04 12 of individuals in the community. It is simply his opinion  
03:10:09 13 based on his experience as a law enforcement officer. So just  
03:10:14 14 keep that in mind as you listen to the experts.

03:10:19 15 With regard to the Jeep, you will hear Deputy Forsyth  
03:10:25 16 take the stand without hesitation, without equivocation, that  
03:10:32 17 the Jeep was moving at him. Can I explain to you how the Jeep  
03:10:39 18 may have been in neutral when Sergeant Branham got there?  
03:10:44 19 Nobody can. Nobody was there other than Deputy Forsyth,  
03:10:49 20 Deputy Love, and Philip Rhoades. And obviously,  
03:10:53 21 Deputy Forsyth and Deputy Love were not in the Jeep at the  
03:10:56 22 time the shots were fired.

03:10:59 23 What I can tell you is the evidence will show that  
03:11:02 24 Deputy Forsyth heard Mr. Rhoades getting on the gas and  
03:11:09 25 revving the engine as he was accelerating toward

Deputy Forsyth. Did he not get it in gear as he was accelerating toward Deputy Forsyth, and then was shot? No one, I submit to you, ladies and gentlemen, no one can take the witness stand and tell you that because no one else was there.

The evidence will be that that Jeep was moving; that we believe that the photographs that were taken by Branham do show evidence of -- I don't want to call it ground disturbance -- where it looks like there were tires spinning. We believe the photographs show that, the pictures where the Jeep is sitting now in those photographs, you can look behind the Jeep and see those areas.

So the issue is, is the Jeep moving? Deputy Forsyth will tell you that it was. Deputy Love will tell you that it was. If the Jeep was moving at the time toward Deputy Forsyth, and he had a reasonable belief that he was going to be either seriously injured or killed and not make it home to see his family, he was justified in the use of deadly force to protect himself. And we believe that the evidence will show that that use of force was justified in this case.

At the conclusion of the case, as Mr. Prince actually indicated, the Judge will give you instructions, and then I will have the opportunity to come back and kind of touch upon the evidence that you have heard from the witness stand, and have any exhibits that have been introduced. And at that

03:13:01 1 point in time, I will focus more obviously on what the  
03:13:06 2 evidence has been that you have heard, and why we believe that  
03:13:09 3 supports a verdict in favor of Deputy Forsyth in this case.  
03:13:14 4 And until that time, I thank you for your time, and I  
03:13:19 5 appreciate your patience. Thank you.

03:13:25 6 THE COURT: Thank you, counsel.

03:13:28 7 Ladies and gentlemen of the jury, we are going to take  
03:13:30 8 our afternoon break at this point, give you a chance to do  
03:13:34 9 that. We will reconvene in 15 minutes at 3:30. At that point  
03:13:40 10 in time, the plaintiff will be calling their first witness.  
03:13:43 11 You will certainly grow tired of me saying this, but I will  
03:13:48 12 say it every time we depart company. Please remember my  
03:13:52 13 previous instructions not to discuss the case amongst  
03:13:55 14 yourselves or with anyone else. Please also refrain from any  
03:14:01 15 independent research, not only about this case, or any of the  
03:14:02 16 issues raised in this case.

03:14:03 17 But with that, we will see you back here at 3:30. Thank  
03:14:08 18 you very much.

03:14:08 19 (Jury excused and the following transpired in open  
03:14:09 20 court.)

03:14:38 21 THE COURT: Thank you all. Please be seated.  
03:14:39 22 Mr. Umina, anything we need to take up at this point, sir?

03:14:43 23 MR. UMINA: Your Honor, the only thing, our first  
03:14:47 24 witness, who is under subpoena, Lieutenant Branham, last I  
03:14:50 25 checked, he never showed up today for his subpoena. We may

03:14:53 1 have an issue with our first witness. Ms. Durst seems like  
03:14:57 2 she knows something about it.

03:14:58 3 MS. DURST: Well, Your Honor, I also had subpoenaed  
03:15:01 4 Lieutenant Branham. I think maybe for anticipating my case in  
03:15:05 5 chief tomorrow and Thursday. And I have received a call  
03:15:09 6 wanting to find out, you know, which day he might be needed.  
03:15:12 7 I talked to him during the lunch break and he indicated that  
03:15:16 8 he had not received a subpoena from Mr. Umina's office. I  
03:15:20 9 advised him that we had received a notification last night  
03:15:25 10 that a subpoena -- a return subpoena had been filed with the  
03:15:28 11 Court, but he indicated he had not received any subpoena when  
03:15:32 12 I talked to him at lunchtime. So I have him scheduled to be  
03:15:37 13 here tomorrow or obviously Thursday. But he indicated he had  
03:15:43 14 not received the subpoena.

03:15:45 15 MR. UMINA: I'd like to shed some light on that, Your  
03:15:47 16 Honor.

03:15:50 17 THE COURT: Before you do that. Does anyone know  
03:15:53 18 Lieutenant Branham's current physical whereabouts?

03:15:56 19 MR. UMINA: Not that I am aware of. I assume  
03:15:59 20 Ms. Durst does. She just talked to him on a lunch break.

03:16:01 21 MS. DURST: I don't physically know where he was,  
03:16:04 22 Your Honor. He left two numbers for my office to call so we  
03:16:06 23 could let him know which day he might be needed.

03:16:09 24 THE COURT: Understood.

03:16:10 25 Mr. Umina.

03:16:10 1 MR. UMINA: Your Honor, I have information that I  
03:16:12 2 think the Court would be interested in. When I sent my  
03:16:16 3 process server to his detachment, his administrative staff  
03:16:22 4 refused the first subpoena. They refused to accept service at  
03:16:26 5 the West Virginia State Police. Then my process server went  
03:16:31 6 back on a second occasion. The administrative staff attempted  
03:16:35 7 to refuse the subpoena again. It's my understanding he is the  
03:16:38 8 detachment commander at the detachment. And my process server  
03:16:43 9 had to threaten him with the fact that they were obstructing  
03:16:45 10 justice by refusing to accept the subpoena. And had it not --  
03:16:49 11 had they not finally accepted it prior to the final pretrial,  
03:16:53 12 I was going to call this to the Court's attention if they  
03:16:55 13 continued to refuse that subpoena.

03:16:57 14 So, Your Honor, what I think I am dealing with here is a  
03:17:00 15 hostile witness. Additionally, defense counsel reached out to  
03:17:05 16 me yesterday and asked if I could share my order of witnesses.  
03:17:09 17 They know that I have Branham under subpoena. I hadn't filed  
03:17:13 18 my return. I hadn't told them that. So how did they know  
03:17:17 19 that I had Branham under subpoena unless Branham told them  
03:17:20 20 that I had them under subpoena? I haven't filed the return,  
03:17:24 21 and I haven't shared that information so I think I have a  
03:17:27 22 really serious issue going on here with Sergeant Branham, Your  
03:17:30 23 Honor, and I would ask the Court to compel him appearing in  
03:17:33 24 this court, and I would like to stay these proceedings because  
03:17:37 25 he will be our first witness in this case, and when he does

1 come here, Your Honor, I would ask to treat him as hostile.

2 THE COURT: Well, hence my question, where his  
3 physical whereabouts may be.

4 Ms. Durst, we are going to take a break. Since you have  
5 contact information for Lieutenant Branham, I would like to  
6 know where he is, how long it might take him to get here  
7 because we are going to have significant discussion with him.

8 Mr. Umina, have you filed return on that subpoena?

9 MR. UMINA: Yes, Your Honor. I filed it last night.

10 THE COURT: What are the current physical whereabouts  
11 of your process server?

12 MR. UMINA: Nathan Crum, he said he could be here.  
13 Can you get him on the phone, please? Thank you.

14 THE COURT: Where is he?

15 MR. UMINA: He is out of Fairmont.

16 THE COURT: Okay. Why don't you check with that  
17 gentleman.

18 Ms. Durst, if you would kindly find out where  
19 Lieutenant Branham physically is at this moment, and we will  
20 reconvene in 15 minutes.

21 (Recess taken at this time 3:18 p.m. - 3:35 p.m.)

22 THE COURT: Thank you all. Please be seated.

23 Mr. Umina, do you have the subpoena that was ultimately  
24 served?

25 MR. UMINA: I have an electronic copy, Your Honor, I

03:35:55 1 can share with the Court right now. And also, the return was  
03:36:13 2 filed at docket number 189 shortly after 12:01 a.m., this  
03:36:21 3 morning.

03:36:22 4 In addition, our process server, Nathan Crum, was en  
03:36:28 5 route here from Morgantown. He arrived shortly after we took  
03:36:32 6 a recess. We gave him a call and he was willing to come down  
03:36:34 7 and explain his experience in serving Lieutenant Branham.

03:36:41 8 THE COURT: What date and time did the subpoena  
03:36:44 9 compel Sergeant Branham's appearance here in this court?

03:36:51 10 MR. UMINA: May I retrieve my laptop, Your Honor?

03:36:51 11 THE COURT: Please.

03:37:27 12 MR. UMINA: Just reconnecting the wifi.

03:37:29 13 THE COURT: Thank you. While we are doing that,  
03:37:31 14 where is Sergeant Branham, Ms. Durst?

03:37:33 15 MS. DURST: Your Honor, I spoke to Sergeant Branham.  
03:37:36 16 He was out running, and he said that he was about a mile from  
03:37:40 17 the detachment. Would head back to the detachment. And he  
03:37:43 18 said it would take him -- by the time he got in his uniform --  
03:37:46 19 he is in Fairmont -- I'm sorry. I just assumed that, Your  
03:37:49 20 Honor. He would be probably about an hour, until he could  
03:37:53 21 make it here. Again, he advised he had not received the  
03:37:59 22 subpoena, Your Honor. And just for --

03:38:02 23 THE COURT: I know. Date and time of that subpoena  
03:38:06 24 to compel his attendance, Mr. Umina?

03:38:08 25 MR. UMINA: 4-6-2021 at 9:00 a.m., Your Honor.



03:38:16 1 THE COURT: Can I trouble you to forward that  
03:38:18 2 subpoena to Ms. Mannon, please?

03:38:20 3 MR. UMINA: Yes, Your Honor.

03:38:21 4 THE COURT: Thank you. Sorry, Ms. Durst. I  
03:38:27 5 interrupted you.

03:38:27 6 MS. DURST: No worries, Your Honor. I just wanted to  
03:38:30 7 note for the record that I had not spoken to Sergeant Branham  
03:38:34 8 at all before this afternoon, Your Honor, at lunchtime when he  
03:38:38 9 had called my office. So to the extent that there is any  
03:38:41 10 implication in Mr. Umina's statement that I somehow influenced  
03:38:46 11 Lieutenant Branham to be here or not be here, I have not had  
03:38:50 12 any communications with him since the deposition until this  
03:38:52 13 afternoon to let him know that I would try to call him at the  
03:38:56 14 end of today to let him know when I needed him for my  
03:38:59 15 subpoena. And that is when I told him that plaintiff's  
03:39:02 16 counsel had filed a return of service on -- for a subpoena for  
03:39:06 17 him that I got when I woke up this morning. That came through  
03:39:10 18 about 12:30 last night.

03:39:12 19 MR. UMINA: Your Honor, I would like to read an email  
03:39:14 20 from Mr. Carroll that I received at 6:37 p.m., yesterday which  
03:39:22 21 Ms. Durst was copied, Mr. Prince, and Mr. Hogan.

03:39:28 22 "Ryan, as we had identified radio logs in our exhibit  
03:39:34 23 list, I have attached the audio logs we plan to play for the  
03:39:39 24 jury. Please let us know whether you have any objections to  
03:39:42 25 the same. Also, I wanted to ask if you would be willing to

03:39:47 1 share your anticipated order of witnesses. The reason I ask  
03:39:51 2 is, I think we may have subpoenaed some of the same folks,  
03:39:55 3 such as Branham and Savasman; just thought it might help  
03:40:01 4 give -- might help give those individuals a better idea of how  
03:40:07 5 long they will be needed."

03:40:09 6 That is it 6:37 p.m., Your Honor. The subpoena return  
03:40:13 7 was not filed until after midnight, and I had not communicated  
03:40:17 8 that in any way to them.

03:40:19 9 THE COURT: I don't for a second -- sit down,  
03:40:22 10 counsel. Not for a second do I believe counsel told Sergeant  
03:40:29 11 Branham not to be here. I don't know what the story is,  
03:40:31 12 refusing to accept service and the rest is, but we are not  
03:40:39 13 diving into that pool, because I don't believe that for a  
03:40:43 14 second.

03:40:49 15 Is there any other witness you have here ready to  
03:40:51 16 testify, Mr. Umina?

03:40:53 17 MR. UMINA: Your Honor, we also have Dr. Savasman,  
03:40:55 18 the medical director, under subpoena who was supposed to be  
03:40:59 19 witness two who, it's our understanding, Your Honor, is not in  
03:41:03 20 the building either.

03:41:04 21 THE COURT: Has anyone looked?

03:41:07 22 MR. UMINA: We have asked. We can go look again.

03:41:10 23 THE COURT: If someone could go kindly do that,  
03:41:14 24 because my immediate concern is the complete waste of the  
03:41:20 25 jury's time that we are now involved in.

03:41:22 1 And let me be clear. I expect counsel to cooperate with  
03:41:28 2 respect to the order of witnesses, coordinating calendars  
03:41:32 3 scheduled to accommodate witnesses, and each other. I thought  
03:41:35 4 I made that clear at the pretrial conference. I thought, just  
03:41:38 5 by nature of the profession you have all chosen, that that  
03:41:41 6 expectation would be clearly understood.

03:41:47 7 Of paramount concern to me is wasting our jurors' time,  
03:41:52 8 and that is where we are. We are not going to have hearings  
03:42:01 9 at every break during this proceeding. Witnesses are to be  
03:42:05 10 here, counsel is to be prepared, so that we can use our  
03:42:09 11 jurors' time as efficiently as possible.

03:42:12 12 I will deal with this with Sergeant Branham. I will deal  
03:42:17 13 with the medical examiner, if necessary. You all need to work  
03:42:21 14 together and make sure folks are here when they are expected  
03:42:25 15 and waiting to testify. I will not tolerate this and waste  
03:42:30 16 those people's time anymore.

03:42:36 17 Is Dr. Savasman anywhere to be found?

03:42:38 18 MR. PRINCE: Your Honor, Dr. Savasman is not present.  
03:42:41 19 We went down to the first floor as well, he is not in the  
03:42:44 20 building. He has not been seen.

03:42:46 21 MR. UMINA: Your Honor, I provided letters with both  
03:42:48 22 of those subpoenas asking both of those individuals to call my  
03:42:52 23 office so that we may not waste their time and so that we can  
03:42:56 24 coordinate schedules, and I didn't receive a call from either.  
03:42:59 25 Additionally, I did pay the additional \$3,000 to the state

03:43:02 1 medical examiner's office weeks ago as required.

03:43:07 2 So, Your Honor, I am not sure what their reason is,  
03:43:10 3 because like Ms. Durst, I provided a letter to both of these  
03:43:14 4 witnesses.

03:43:14 5 THE COURT: We are certainly going to ask them,  
03:43:16 6 Mr. Umina. I'm certainly going to ask them.

03:43:25 7 Does anyone have contact information or have any line of  
03:43:28 8 communication with Dr. Savasman? Am I pronouncing his name  
03:43:32 9 correct?

03:43:32 10 MS. DURST: I think that is the correct  
03:43:34 11 pronunciation, Your Honor.

03:43:38 12 THE COURT: Mr. Umina, instead of forwarding the  
03:43:41 13 subpoenas, I will ask you to file both of the subpoenas. I  
03:43:45 14 have the returns. Please file the subpoenas along with any  
03:43:46 15 cover letter or any information sent to the --

03:43:48 16 MR. UMINA: Your Honor, is it cover -- they are all  
03:43:51 17 in the same document.

03:43:51 18 THE COURT: That's fine absolutely. And you can file  
03:43:54 19 them altogether as one, whatever is easiest. I just want them  
03:43:56 20 in the record.

03:43:57 21 Ms. Durst, I am going to ask you -- I realize he is  
03:44:00 22 not your client, and not your responsibility, to contact  
03:44:03 23 Sergeant Branham. We are not waiting an hour for him today.  
03:44:06 24 He is to be here at 9:00 a.m., tomorrow morning.

03:44:14 25 My apologies to Mr. Crum. I realize he is also probably

on his way. If I could trouble someone to let him know that I would also like him to be here at 9:00 a.m., tomorrow morning if that is possible for him. I realize he is not under subpoena. If that is inconvenient for him, let me know.

Ma'am, I will direct my comments to you, it's clear you are going to be responsible for this; if you would reach out to Mr. Crum, thank him for his efforts to get here. I don't want him rushing down the road either, but if he could be here at 9:00 a.m., tomorrow, I would like to hear more from him about the circumstances, please. Thank you very much.

It's now quarter 'til four. We are going to bring the jury back in and excuse them for the day. I, of course, as always, will take the blame for this. It is not to occur again. If folks aren't here when you anticipate them to be here, they are under subpoena, let me know so that we can do something about it. Sergeant Branham being on a run, needing a shower, and change of clothes, does us no good. Please communicate that to him as well. I will address it with him again tomorrow. If he was served with a valid, enforceable subpoenaed issued from this court as a law enforcement officer in the State of West Virginia, and simply chose not to be here, he has some serious explaining to do and will face serious consequences in this court.

Again, I will not tolerate the waste of these jurors' time for things like this. It is inexcusable.

03:45:40 1 Is there anything else we need to take up today?

03:45:42 2 Counsel, of course, will be here at 9:00 a.m., tomorrow.

03:45:44 3 As well, we are going to hear from Mr. Crum, and then we are

03:45:47 4 going to hear from Sergeant Branham. If we can get

03:45:50 5 Dr. Savasman here, that would also be beneficial. Because if

03:45:51 6 he has been served with a subpoena as the chief medical

03:45:53 7 examiner of the state of West Virginia -- is that his title,

03:45:56 8 Mr. Umina?

03:45:56 9 MR. UMINA: I believe so, Your Honor.

03:45:57 10 THE COURT: Or he works in the medical examiner's

03:45:59 11 office?

03:45:59 12 MR. UMINA: I know that he was served and he knows he

03:46:02 13 got service because I got the bill which was paid. So there

03:46:06 14 is no way I am getting a bill for \$3,000, Your Honor, if he

03:46:10 15 didn't receive my subpoena.

03:46:12 16 THE COURT: If he also received a valid, enforceable

03:46:15 17 subpoena of this Court and did not appear pursuant to that

03:46:19 18 subpoena, he also is going to face significant consequences.

03:46:24 19 I am not kidding. This is not happening again. It's not.

03:46:30 20 I am not really sure what I can do about it if it happens

03:46:33 21 again, but it better not happen again.

03:46:36 22 Sir, could I ask you to bring our jury back in. Thank

03:46:39 23 you.

03:47:38 24 (Jury returned to the courtroom and the following

03:47:39 25 transpired in open court.)

03:47:40 1 THE COURT: Ladies and gentlemen, due to a scheduling  
03:47:42 2 issue of my creation, we are not going to hear from our first  
03:47:47 3 witness until we reconvene tomorrow. We will, of course,  
03:47:52 4 convene at 10:00.

03:47:54 5 Mr. McCartney, if you are not here by ten, we will wait  
03:47:57 6 for you, sir. Please take your time. But my experience with  
03:48:03 7 the vaccination process is it's rather efficient, but we will  
03:48:06 8 certainly wait for you. Please don't rush or be hurried in  
03:48:09 9 any way.

03:48:10 10 We will plan a target start time of 10:00 for your  
03:48:14 11 purposes, ladies and gentlemen. So we are going to excuse you  
03:48:16 12 for the day. We will see you back here at 10:00 a.m.,  
03:48:19 13 tomorrow.

03:48:22 14 Something I neglected to consider earlier today for  
03:48:26 15 which I will apologize, I like a cold room. I realize my  
03:48:32 16 temperature preferences may not be in line with everyone else  
03:48:35 17 in the world. We will make sure it is a little more temperate  
03:48:37 18 in here tomorrow, as opposed to my usual preferred  
03:48:41 19 temperature. My apologies for that. But we will excuse you  
03:48:44 20 for the day. See you at 10:00 tomorrow morning, and we will  
03:48:47 21 hear from our first witness.

03:48:49 22 Please do not discuss the case with anyone, that includes  
03:48:52 23 amongst yourselves or any fellow jurors or anyone else.  
03:48:55 24 Please blame me when you get home if someone asks you what you  
03:48:59 25 have been doing today. Tell them I won't let you talk about

03:49:02 1 it.

03:49:02 2 Also, please continue to refrain from any independent  
03:49:06 3 efforts to investigate, not only in this case, or any issues  
03:49:08 4 we have discussed so far in this case.

03:49:10 5 With that, we thank you for your time. I certainly thank  
03:49:13 6 you for your patience here today. We will see you all at  
03:49:15 7 10:00 in the morning. Thank you so much.

03:49:42 8 (Jury excused, and the following transpired in open  
03:49:43 9 court.)

03:49:44 10 THE COURT: Thank you. We will convene at 9:00  
03:49:47 11 tomorrow morning. Sergeant Branham is to be here. Mr. Crum  
03:49:50 12 should be here. I don't know about the medical examiner -- if  
03:49:56 13 no one has a line to him -- but if someone can kindly reach  
03:49:58 14 out. It's still before 4:00 anyway on a workday. He is also  
03:50:03 15 to be here at 9:00 a.m., tomorrow.

03:50:08 16 FEMALE SPEAKER: Your Honor, I just spoke to  
03:50:09 17 Mr. Crum. He has to go to Columbus at 9:00 a.m. He can  
03:50:12 18 appear by video or he said he can send someone from his office  
03:50:16 19 who attempted service the first time it was refused, and he  
03:50:19 20 can be here at 9:00 a.m.

03:50:20 21 THE COURT: If Mr. Crum can join us by telephone that  
03:50:23 22 will suffice for me. Please pass along my thanks to Mr. Crum.  
03:50:27 23 I realize he wasn't on the witness list for this case. We  
03:50:34 24 will call him from -- if he has somewhere where we can reach  
03:50:38 25 him. I don't anticipate occupying many minutes of his day.



1 To be clear, counsel every day is to confer when we  
2 adjourn to discuss who everyone intends to call the following  
3 day and in what order. There is no rule or order of this  
4 Court that requires it, but there will be going forward. This  
5 is not acceptable. I expect counsel to have a collegial and  
6 working relationship. It is clear that has deteriorated in  
7 this case. I don't expect everybody to be friends. I realize  
8 this is litigation, and that is an adversarial process. We're  
9 not wasting the jurors' time another second during the course  
10 of this trial. And I will begin rectifying that at 9:00 a.m.,  
11 tomorrow in this courtroom.

12 We are adjourned until then.

13 (Proceedings adjourned at 3:51 p.m.)

14 C E R T I F I C A T E

15 I, Jill M. Cutter, Registered Professional Reporter and  
16 Official Reporter for the United States District Court for the  
17 Northern District of West Virginia, so hereby certify that the  
18 foregoing is a correct transcript to the best of my ability of  
19 the proceedings in the above-styled action on April 6, 2021,  
20 as reported by me in stenotypy.

21 I certify that the transcript fees and format comply with  
22 those prescribed by the Court and Judicial conference of the  
23 United States.

24 Given under by hand this day, April 26, 2021.

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/s/ Jill M. Cutter, RPR

Official Reporter, United States  
US District Court for the Northern  
US District of West Virginia

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